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MICHAEL RODAK, JR.

No. 72-1303

IN THE

SUPREME COURT OF THE UNITED STATES

JUANELLE TUBBS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari
to the United States Court of Appeals, Fifth Circuit

Petition For Writ of Certiorari

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JUANELLE TUBBS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari
to the United States Court of Appeals, Fifth Circuit

Petition For Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES Juanelle Tubbs, Petitioner, and submits her Petition for Writ of Certiorari, and would respectfully show the following:

OPINIONS OF THE COURTS BELOW

The Memorandum Opinion of the United States District Court for the Northern District of Texas is reported in 348 F.S. 1404 (ND Texas, 1972).

The Opinion of the United States Court of Appeals for the Fifth Circuit, dated January 15, 1973, affirming the judgment of the Trial Court for Respondent, is reproduced in the Appendix to this Petition for Writ of Certiorari. Such Opinion of the Fifth Circuit

contains, as an appendix thereto, the Opinion of the United States District Court for the Northern District of Texas referred to in the preceding paragraph.

Also included in the Appendix to this Petition is a copy of the Judgment of the Fifth Circuit dated January 15, 1973, and a copy of the Opinion of the Fifth Circuit denying the Petition for Rehearing of Plaintiff-Appellant dated February 16, 1973.

STATEMENT AS TO JURISDICTION

The Opinion and Judgment of the District Court sought to be reviewed is dated August 4, 1972, and the Judgment of the Fifth Circuit affirming such judgment is dated January 15, 1973.

Appellant's Motion for Rehearing was denied by the Fifth Circuit on February 16, 1973.

On February 28, 1973, the Fifth Circuit granted a stay of the issuance of the Mandate to March 30, 1973.

Jurisdiction to review the Judgment of the United States Court of Appeals for the Fifth Circuit by Writ of Certiorari is conferred upon this Court by the provisions of *Title 28, U.S.C., § 1254(1)*.

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1

In holding that the evidence (that the grantor continued to collect the rent from the tenant of the property after conveying a minority undivided interest in the property to her daughter) *conclusively established* an implied agreement between the grantor and grantee that the grantor was to have lifetime enjoyment of the entire property, which required inclusion of the entire property in the grantor's gross estate under *Title 26, U.S.C., § 2036(a)*, the District Court and the Circuit Court wholly failed to give consideration to the well-established rule that either of the joint owners (co-tenants) in real property has the right to use the entire property and collect the entire income from the property (holding the co-tenant's portion of such income in trust for his co-tenant).

QUESTION 2

The Circuit Court erred in upholding a directed verdit in favor of the Government because, under the decision of this Court in *United States v. Byrum*, 33 L.Ed.2d 238 (June 26, 1972), there must be a legally enforceable "right" in the grantor (in this case, to retain and enjoy all of the income from the property during her lifetime), and there is abundant evidence in the case at bar that the grantor had no "right" to the lifetime enjoyment of all the property and all of the income therefrom.

QUESTION 3

The District Court and the Circuit Court erred in holding that the evidence conclusively established the existence of an implied agreement that the grantor was to have lifetime enjoyment of the property, because there was both direct and circumstantial evidence (including the unequivocal testimony of the grantee, Mrs. Tubbs) that there was no such agreement, which evidence raised a fact issue as to the existence, vel non, of an implied agreement requiring submission of this issue to the jury, and the judgments of the Courts below deprive Petitioner of the right to a jury trial of such fact issue.

STATUTE WHICH THIS CASE INVOLVES

The statutory provision involved in this case is *Title 26, U.S.C., § 2036(a)(1)* (appearing on p. 120 of the volume of the United States Code Annotated, Title 26, containing §§ 2001 to 4000), which provides:

> "(a) *General rule.* — The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death —
>
> "(1) the possession or enjoyment of, or the right to the income from, the property, or"

STATEMENT OF THE CASE

Plaintiff, Mrs. Juanelle Tubbs, was the independent executrix and sole divisee of the Will of her mother, Mrs. Linnie R. Garrard.

Plaintiff brought this action against the United States to recover estate taxes and interest which plaintiff alleges were erroneously and unlawfully assessed and collected on the Estate of Mrs. Linnie R. Garrard.

Jurisdiction of this action is conferred on the United States District Court by the provisions of *Title 28, U.S.C., § 1346(a)(1)*, providing that the district courts shall have original jurisdiction concurrent with the Court of Claims of "Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws * * *."

Mrs. Garrard died in March of 1966, and the probate on the estate was concluded prior to the time the assessment was made and the taxes paid (A 57-58) (all "A" references herein refer to pages of the printed Appendix).

The recovery of taxes sought are those attributable to an undivided 480/1293 interest of farmland and improvements in Lynn County, Texas, it being the contention of plaintiff that such interest was erroneously included in the Estate of Mrs. Garrard because such undivided 480 acres had been conveyed to plain-

tiff by her mother as a gift by deed duly executed and recorded in December of 1961.

The only matter in controversy between the Government and plaintiff with respect to the estate tax return of Mrs. Garrard is this issue of whether or not the 480 acres in the Lynn County farm should have been included in the estate of Mrs. Garrard. The return of Mrs. Garrard was audited by the Government, and the taxes paid (A 26-27), and no contention is made by the Government of the inaccuracy of the return in any other respect.

It is undisputed that the entire tract of 1293 acres in Lynn County was farmland which, during the material times in question, was rented to and was farmed by a Mr. Pennington. Mrs. Garrard lived in Tahoka and never lived on the land in question (A 79, 77).

It is undisputed that some time in November of 1961 Mrs. Garrard had a conversation with her attorney, Mr. James Milam. Plaintiff's husband, Mr. Fenner Tubbs, was also present during this discussion. Mrs. Garrard asked Mr. Milam how much she could give her daughter without paying a gift tax on it, and he advised her that she could give a gift of $30,000.00. Mrs. Garrard stated that she desired to give Mrs. Tubbs an undivided interest in the farmland in Lynn County, and they figured the value of it and determined that she could give her daughter about 480 acres. Mr. Milam advised her that "Mrs. Garrard, you've got to give that, you can't keep any strings attached to it. Juanelle has got to have the income." (A 65). Mrs. Garrard stated that was what she

wanted to do, and that she wanted her daughter to have it (A 65, 74-75).

Pursuant to Mrs. Garrard's direction, Mr. Milam prepared a deed conveying the 480 acres to Mrs. Tubbs. Mrs. Garrard came to Mr. Milam's office and executed the deed on December 26, 1961. Her acknowledgment was taken, she delivered the deed to her daughter who was with her, and Mr. Milam sent the deed to be recorded (A 65-67).

Mrs. Tubbs testified unequivocally that at the time Mrs. Garrard executed the deed she had no agreement or understanding with her mother that her mother would be entitled to the rent or that she might enjoy that land the rest of her life (A 31).

In affirming the Judgment of the District Court, the Fifth Circuit stated that the facts were summarized in the District Court's Opinion which was attached to the Fifth Circuit's Opinion as an appendix. We presume that the Fifth Circuit considered only the facts which were referred to in the District Court's Opinion. We would point out to this Court that we consider that the following facts, which we do not find any mention of in the District Court's Opinion, are vitally important in determining whether or not there is some evidence on which a jury could reasonably infer that there was no agreement, express or implied, made between Mrs. Garrard and Mrs. Tubbs at or after the time of the execution of the Deed of Gift that Mrs. Garrard should retain the use and enjoyment of the fractional interest of the land conveyed by Mrs. Garrard to Mrs. Tubbs by the deed.

Mrs. Tubbs testified that while she did not demand her portion of the rent from the land, she knew that she was entitled to her portion of the rent whenever she wanted to demand it and could have done so at any time (A 45, 49).

Mrs. Garrard's estate, at her death, included money in excess of $40,000.00 (A 28).

Mrs. Garrard had put $10,000.00 on deposit in a savings account to the joint credit of herself or Mrs. Tubbs on December 28, 1965 (A 28, 114, 115).

Mrs. Garrard made several substantial gifts of money to Mrs. Tubbs and to the children of Mrs. Tubbs over a period of a year (A 33-40, 117-123).

Mrs. Tubbs knew she was entitled to the rents from her land but didn't need the money and further knew that Mrs. Garrard lived frugally and that if Mrs. Tubbs had needed something, Mrs. Tubbs knew that Mrs. Garrard would have given it to her (A 45). Mrs. Tubbs knew Mrs. Garrard was saving her money and that at Mrs. Garrard's death, Mrs. Tubbs would receive all of it and if Mrs. Garrard had started spending a bunch of money or talked about getting married, Mrs. Tubbs might have demanded her share of the rents (A 49). Mrs. Garrard's GROSS INCOME from the 1293 acres of land, of which Mrs. Tubbs owned 480 acres, for the calendar years subsequent to the date of the gift of the 480 undivided acres to Mrs. Tubbs was $31,499.97 (A 125).

Mrs. Tubbs' share (480/1293) of this amount is $11,693.72.

It seems quite obvious that even though Mrs. Garrard continued to retain the possession of the entire 1293 acres which she had a right to do as a co-tenant with her daughter, Mrs. Tubbs, nevertheless, as far as the income from the 480 acres is concerned, Mrs. Garrard never used or enjoyed any of the rents due Mrs. Tubbs at any time subsequent to the date of gift. Mrs. Garrard, from the date of the gift until her death, was not only not using or enjoying the rents from Mrs. Tubbs' land, but she was accumulating funds from her share of the land and did not at any time make any use of any of the rents due Mrs. Tubbs except to retain possession for delivery to Mrs. Tubbs at any time Mrs. Tubbs should demand it.

ARGUMENT

The District Court directed a verdict in favor of the Government, thereby holding, as a matter of law, that the undivided 480/1293 interest in the 1293-acre tract of farmland in Lynn County, Texas, conveyed by Mrs. Garrard to her daughter, Mrs. Tubbs, in 1961, was includable in the gross estate of Mrs. Garrard under *26 U.S.C., § 2036(a)(1)*.

It is clear under the provisions of *26 U.S.C., § 2036(a)(1)*, and the cases construing this provision, that property conveyed by the grantor is includable in the gross estate of the grantor upon his death only in cases where at least one of the following is present:

(1) The instrument of conveyance expressly reserves to the grantor the possession or enjoyment of, or the right to income from the property;

(2) There is an express agreement or an implied agreement (in connection with or as an incident to the transfer or conveyance) reserving to the grantor the possession or enjoyment of, or the right to income from the property, or

(3) The conduct of the parties subsequent to the transfer or conveyance is such as to conclusively establish the existence of an express or implied agreement between the grantor and grantee (in connection with or incident to the transfer or conveyance) reserving such rights to the grantor and that there is no substantial evidence from which the finder of fact could conclude that there was no such express or implied agreement.

See *McNichol's Estate v. C.I.R.*, 265 F.2d 667 (3rd Cir., 1959), certiorari denied, 361 U.S. 829.

In the case at bar, it is undisputed that the deed conveying the undivided 480/1293 interest in the farmland to Mrs. Tubbs was an unrestricted fee simple conveyance and contained no reservation of any right in the grantor to the possession or enjoyment of or the right to income from the interest conveyed. Likewise, there is no evidence of any express or implied agreement at the time of the transfer retaining such right in the grantor. Mrs. Tubbs testified unequivocally that there was no such agreement or understanding (A 31), and there is no evidence to the contrary.

Therefore, the District Court could not properly direct a verdict in favor of the Government unless there was no substantial evidence with respect to the

conduct of the grantor and grantee subsequent to the conveyance from which a jury could have reasonably found as a fact or reasonably inferred from such evidence that such implied agreement for a reservation of such rights by the grantor did not exist at the time of the transfer.

The Court is not authorized to determine the credibility of the witnesses or the weight to be given their testimony or other evidence or to determine the preponderance of the evidence.

It is, of course, fundamental that the Court cannot direct a verdict in favor of either party unless the jury could reasonably draw only one inference or conclusion from all of the facts. *Texas & Pacific R. Co. v. Cox*, 145 U.S. 593, 36 L.Ed. 829 (9)(1891); *Vol. 9, Cyclopedia of Federal Procedure 344, § 31.72; Brodrick v. Derby*, 236 F.2d 35 (6)(10th Cir., 1956); *Brady v. Southern R. Co.*, 320 U.S. 476, 88 L.Ed. 239 (3) (1943); *Wilson v. Bailey*, 257 F.2d 352 (1) (10th Cir., 1958); *Meitz v. Garrison*, 413 F.2d 895 (2) (8th Cir., 1969).

Also, in this connection, it is well settled that the question of the existence, vel non, of an implied contract is a question of fact, particularly where, as here, the facts in connection therewith and the inferences to be drawn therefrom are conflicting. *Shapira v. United Medical Service, Inc.*, 205 NE2d 293 (2) (Ct.App., N.Y., 1965); *C. F. Bolster Co. v. J. C. Boespflug Construction Co.*, 334 P.2d 247 (9) (Dist.Ct.App., Cal., 1959); *Caron v. Andrew*, 284 P.2d 550 (5) (Dist.Ct.

App., Cal., 1955); *Bell v. Hyde*, 29 NYS2d 74 (1) (S.Ct., App.Div., 1941).

As in any contract, an implied agreement is not a contract between the parties until there is a meeting of their minds on the terms of the contract. We urge this Court that regardless of what Mrs. Garrard may have intended or in her own mind understood with regard to her retention of the possession, enjoyment and right to income of Mrs. Tubbs' undivided interest in the land at the time of or subsequent to the transfer, Mrs. Tubbs never so intended or understood that such should be the case. Mrs. Tubbs always understood her rights as joint tenant to her proportionate part of the possession, enjoyment and right to income from her proportionate part and intended to exercise all these rights as a joint tenant of Mrs. Garrard, at the time Mrs. Garrard delivered the deed to Mrs. Tubbs, and continuously and consistently at all times thereafter, maintained such intentions; and in fact subsequent events proved that Mrs. Garrard had only exercised her rights to possession of the property as a joint tenant and did not in any way enjoy or receive the benefit of the income of Mrs. Tubbs' share of the jointly owned property.

The fact situation in this case is unique with respect to previously decided cases under *Title 26, U.S.C., § 2036(a)(1)*. This case involves the conveyance of an undivided interest in an income-producing tract of land (specifically, a 480/1293 interest in a 1293-acre tract of farmland in Lynn County, Texas). The grantor, Mrs. Garrard, retained not only an undivided interest in the land, but, in fact, a majority undivided interest, and, therefore, subsequent to the

conveyance, Mrs. Garrard and Mrs. Tubbs were joint owners (i.e., joint tenants or co-tenants) in the property with equal rights to occupy, use and enjoy the entire 1293 acres until the other made demand for her share, even though each one owned an indefeasible fee simple title to her respective share of the land. There is no dispute between plaintiff and the Government concerning the 813/1293 interest retained by Mrs. Garrard in the property. Such property was included in Mrs. Garrard's estate tax return and estate taxes were paid thereon.

The District Court has detailed only that part of the evidence from which the jury could infer and find that an implied agreement between Mrs. Garrard and Mrs. Tubbs did exist. However, much of this evidence and, in addition, other evidence which was not referred to or discussed by the District Court, as set forth in the preceding statement of the case, would likewise amply support a finding by the jury that no such implied agreement existed. The Court was not authorized to arbitrarily disregard any of the evidence.

The District Court and the Fifth Circuit gave *conclusive effect* to the evidence that subsequent to the conveyance Mrs. Garrard continued to collect all of the rents from the tenant who farmed the property and paid income taxes thereon.

We submit that the portion of the evidence considered by the Court does not in any manner conclusively establish either the right of Mrs. Garrard to collect and retain all of the rents from the property, but in truth and fact establishes conclusively that the act of the joint tenant-grantor in retaining all of the

rents and reporting the same as income was a conversion by the joint tenant-grantor of the joint tenant-grantee's portion of the rent and rendered the joint tenant-grantor liable to the joint tenant-grantee for restoration of all such sums upon demand by the joint tenant-grantee for her portion of the income from the property, and limitations on the claim of the joint tenant-grantee would not commence to run until the joint tenant in possession denied the title of the joint tenant-grantee or until the joint tenant-grantee makes demand on the other joint tenant for partition and restoration of her portion of the income.

The fact that the grantor-joint tenant (Mrs. Garrard) wrongfully converted income did not impose any burden on Mrs. Tubbs to report such income on her income tax return, as the evidence shows that Mrs. Tubbs was on a cash basis, and not having actually received such income, she was under no obligation to report it as income on her tax returns.

It is well settled in Texas that a joint owner or co-tenant of property has the right to the use and possession of all of the property and that a joint owner or co-tenant may collect and receive the entire income from the property, but in such event he (or she) holds the proportionate part of the income belonging to his co-tenant in trust for his co-tenant. *15 Tex.Jur.2d 168, "Co-tenancy," § 11; Bird v. Stein,* 204 F.2d 122 (5th Cir., 1953), rehearing denied, 205 F.2d 512 (5th Cir., 1953); *Ferguson v. Ferguson,* 181 SW2d 601, 602 (Tex.Civ.App., 1944, error ref. w.m.); *Cline v. Niblo,* 8 SW2d 633 (10) (Tex.S.Ct., 1928); *Manning v. Ben-*

ham, 359 SW2d 927 (15) (Tex.Civ.App., 1962, error ref. n.r.e.). Therefore, under the Texas law, Mrs. Garrard had the right to use and possession of the entire property, and, likewise, Mrs. Tubbs, as a co-tenant, had the right to use and possession of the entire property. The fact that Mrs. Garrard may have retained the income collected and paid taxes thereon certainly is not controlling with respect to whether the property was required to be included in the gross estate of Mrs. Garrard for estate tax purposes under *Title 26, U.S.C. § 2036(a)(1)*. Mrs. Garrard held the portion of the rent collected for Mrs. Tubbs in trust for Mrs. Tubbs, and her retention thereof constituted a conversion by Mrs. Garrard of the rent owing to Mrs. Tubbs, but such conversion and the income tax liability arising from such conversion certainly would not be conclusive with reference to the question of the inclusion of the real estate in the estate of the decedent under *26 U.S.C., § 2036(a)(1)*.

In this regard, we respectfully refer to the case of *United States v. Byrum*, 33 L.Ed.2d 238 (June 26, 1972), a case involving the same provision of the estate tax statutes which was recently before this Court. In *Byrum*, the Government contended that certain rights retained by the grantor of stock given to a trust for the benefit of his children, including the right to vote the stock in which he held a majority interest, constituted a retention of the lifetime enjoyment of such stock, because, by such voting rights, the grantor retained the right to regulate the flow of income to the trust and ultimately as between the beneficiaries of the trust. In affirming the summary judgment granted

to the executor of the deceased's estate, this Court said, inter alia:

> "It must be conceded that Byrum reserved no such 'right' in the trust instrument or otherwise. *The term 'right,' certainly when used in a tax statute, must be given its normal and customary meaning. It connotes an ascertainable and legally enforceable power, such as that involved in O'Malley.* * * * That 'right' was neither ascertainable nor legally enforceable and hence was not a right in any normal sense of that term." 33 L.Ed.2d, p. 247. (emphasis ours)

Likewise, in the case at bar, it is clear that Mrs. Garrard had no "right" to use and retain all of the income from the property.

As noted in the testimony above, Mrs. Tubbs testified that she knew that she was entitled to her portion of the rent and could have demanded it at any time. Also, Mrs. Garrard put $10,000.00 on deposit in a joint savings account payable to herself or Mrs. Tubbs, and Mrs. Garrard never used or enjoyed any of the rents due to Mrs. Tubbs from the time of the conveyance until her death.

The Texas law with respect to joint tenancy and a holding by the Court in this case that there was a fact issue as to the existence of an express or implied agreement certainly would not conflict with the law of the other states. Numerous other states have similarly held that a joint owner or co-tenant has the right to use and possession of all of the property and that he may collect the entire income from the property, and in such event he holds the proportionate part thereof

belonging to his co-tenant in trust for his co-tenant. Among states so holding are: Alabama, California, Delaware, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Tennessee, and Vermont. *Fundaburk v. Cody*, 72 So.2d 710 (S.Ct., Ala., 1954); *Garcia v. Venegas*, 235 P.2d 89 (Dist.Ct.App., Cal., 1951); *Garber v. Whittaker*, 174 A. 34 (S.Ct., Del., 1934); *Fountain v. Davis*, 29 SE2d 798 (Ct.App., Ga., 1944); *In Re Randall's Estate*, 132 P.2d 763 (S.Ct., Idaho, 1942), rehearing denied, 135 P.2d 299 (S.Ct., 1943); *Harper v. Sallee*, 34 NE2d 860 (10) (St.Ct., Ill., 1940); *Price v. Andrew*, 10 NE2d 436 (App.Ct., Ind., 1937); *Hill v. Jones*, 170 A. 154 (S.Ct.Errors, Ky., 1934); *Smither v. Betts*, 264 SW2d 255 (Ct.App., Ky., 1954); *Succession of Grubbs*, 182 So.2d 203 (Ct.App., La., 1965); *Goff v. MacDonald*, 129 NE2d 115 (S.Jud.Ct., Mass., 1955); *Sullivan v. Sullivan*, 2 NW2d 799 (S. Ct., Mich., 1942); *Wilder v. Currie*, 95 So.2d 563 (S.Ct., Miss., 1957); *Jeffress v. Piatt*, 370 SW2d 383 (S.Ct., Mo., 1963); *Thompson v. Flynn*, 58 P.2d 769 (S.Ct., Mont., 1936); *Tesar v. Leu*, 56 NW2d 803 (S.Ct., Neb., 1953); *Finley v. Keene*, 42 A.2d 208 (Ct.Chancery, N.J., 1945); *Petchanuk v. Mohlsick*, 123 NYS2d 382 (S.Ct., 1953); *Dearman v. Bruns*, 181 SE2d 809 (Ct.App., N.Car., 1971), certiorari denied, 183 SE2d 241 (S.Ct., N.Car., 1971); *Bowers v. Western Livestock Company*, 103 NW2d 109 (S. Ct., N.Dak., 1960); *Brannon v. Adkins*, 216 NE2d 71 (Ct.Common Pleas, Ohio, 1966); *Everly v. Shannopin Coal Co.*, 11 A.2d

700 (Superior Ct., Pa., 1940); *Sipes v. Sanders*, 66 SW2d 261 (Ct.App., Tenn., 1933); *Aldrich v. Stevers*, 61 A.2d 551 (S.Ct., Vt., 1948).

See, also, *86 C.J.S., "Tenancy in Common,"* § 47; and *Bird v. Stein*, 204 F.2d 122 (5th Cir., 1953), rehearing denied, 205 F.2d 512 (5th Cir., 1953).

We respectfully submit that the authorities cited by the Circuit Court and the District Court do not support the Circuit Court's Judgment affirming a directed verdict for the defendant.

The case of *Guynn v. United States*, 437 F.2d 1148 (4th Cir., 1971), cited by the Fifth Circuit, in fact supports the position of Petitioner that where (as in this case) there is a conflict in the evidence, it is required that such issue be submitted to the trier of fact to resolve. The Fourt Circuit, in *Guynn*, simply held that the fact that the mother continued in possession of the house constituted a significant factor in determining the existence of an implied agreement that the mother would retain possession and enjoyment of the property. The District Court in that case had rendered judgment for the taxpayer, and the Fourth Circuit simply reversed and remanded for admission of this testimony and consideration thereof by the jury in determining the existence of any express or implied agreement between the grantor and grantee.

In *McNichol's Estate v. C.I.R.*, 265 F.2d 667 (3rd Cir., 1959), certiorari denied, 361 U.S. 829, the Circuit Court affirmed the findings and judgment of the tax court. In that case, it was undisputed that there was an express agreement between the grantor and

grantee that the grantor would retain the income from the real estate during his lifetime. The Court said (p. 669):

> "Contemporaneously with and subsequent to the execution of the deeds, it was orally understood between the decedent and his children that the decedent should retain for his lifetime the income from the real estate. In accordance with this understanding the decedent actually received all of such income from the dates of the deeds to the time of his death."

The Court simply held, in that case, that it was not necessary that the retention of rights be expressly stated in the instrument of conveyance or that the agreement retaining such rights be in writing. The Court did hold that the statute required that a life interest " * * * must be retained in connection with or as an incident to the transfer." 265 F.2d, p. 670.

In analogous cases which are even stronger from the Government's standpoint than the case at bar, the Courts have held that a summary judgment or directed verdict is not proper and that there was a fact issue as to the existence of an express or implied agreement between the grantor and grantee which would require inclusion of the property in the decedent's estate.

In *Union Planters National Bank v. United States*, 238 F.S. 883 (WD Tenn., 1964), affirmed, 361 F.2d 662 (6th Cir., 1966), suit was brought to recover refund on estate taxes paid by plaintiff, as executor of the estate of Forrest Ladd. In the year preceding his death, Mr. Ladd had deeded his entire interest in the

residence of his wife and himself to his wife. In the trial, Mrs. Ladd testified that there was no discussion between herself and Mr. Ladd and no express agreement that he would have the right to continue to live in the house but she intended that she and her husband would always live there together.

Both the plaintiff taxpayer and the defendant, United States, filed motions for summary judgment which were overruled by the District Court. The District Court submitted to the jury the issue inquiring whether in 1958, when he executed the deed to the residence, there was an implied agreement or understanding between Mr. and Mrs. Ladd that he would have the right to continue to live in the residence. The jury answered this question in the negative, and the District Court rendered judgment in favor of the plaintiff on the basis of the jury's answer to this issue. The Sixth Circuit affirmed the judgment of the District Court. The Sixth Circuit stated (p. 667):

> "The Government contends that a contract for continued possession and enjoyment must be implied from the fact that a husband gave the family residence to his wife but continued to live in the home until his death. We think this is no more logical than to contend that personal property, such as an automobile or household effects, given by the husband to the wife, must be taxed to his estate because he continues to use such property jointly with his wife until his death.
>
> * * * * *
>
> "The problem presented by this case is essentially one of statutory interpretation and should be resolved by Congress. See 41 Notre Dame Law.

> 97 (1965). In the absence of a clearly expressed congressional intent, we decline to adopt a construction of this statute requiring a presumption or inference of an implied contract based entirely upon the existence of the family relationship. We do not read the present language of this statute to require a holding that 'the existence of a family relationship in itself is a handicap to one's right to contract or to express the virtue of unselfishness.' Burrill v. Shaughnessy, 71 F.Supp. 99 N.D.N.Y., 1947)."

Of course, the case at bar is much stronger from the taxpayer's standpoint than the *Union Planters National Bank* case, since in that case the deceased conveyed his entire interest in the property (to his wife), and in the case at bar, the deceased conveyed only an undivided interest (and, in fact, a minority undivided interest) in the property to her daughter, and they continued to be co-tenants of the property until the grantor's death.

Also in *Stephenson v. United States*, 238 F.S. 660 (WD Va., 1965), the deceased, Walter Stephenson, conveyed to his wife the house in which they were living. Both the deceased and his wife continued to live in the house thereafter until the deceased's death. The deceased's wife, Mrs. Elizabeth W. Stephenson, brought this action to recover estate taxes paid on the alleged wrongful assessment and collection of estate tax by the District Director in including the property in the decedent's gross estate. The United States filed a motion for summary judgment on the basis of depositions, contending there was no fact issue in that the

evidence showed the deceased retained possession and enjoyment of the property. The Court denied defendant's motion for summary judgment, holding that the evidence to the effect that there was no express or implied agreement between the husband and his wife that he was to retain possession or enjoyment of the property during his life raised a substantial fact issue precluding summary judgment for the Government.

Similarly, in the *Estate of Allen D. Gutchess*, 46 T.C. 554 (1966), the Court held that the fact that the husband continued in possession and enjoyment of the family residence for some eleven years after he had conveyed his interest therein to his wife did not require inclusion of his interest in the residence in his estate. The Court said (p. 557):

> " * * * The transferor husband's use of the property by occupancy after the transfer is a natural use which does not diminish transferee wife's enjoyment and possession and which grows out of a congenial and happy family relationship. *Such post-transfer use is insufficient to indicate any prior agreement or prearrangement for retention of use by the transferor. Union Planters National Bank v. United States*, 238 F.Supp. 883 (W.D. Tenn., 1964), affd. 361 F.2d 662 (C.A. 6, 1966); *Stephenson v. United States*, 238 F.Supp. 660 (W.D. Va. 1965); *Estate of Gordon A. Binkley v. United States*, 358 F.2d 639 (C.A.3, 1966); and *Estate of Robert W. Wier*, 17 T.C. 409." (emphasis ours)

In *Estate of Binkley v. United States*, 358 F.2d 639 (3rd Cir., 1966), a home was purchased in the name of the wife with funds supplied by the husband, and

thereafter they lived together in the home for some ten years prior to the husband's death. The Government contended that the home was includable in the husband's gross estate because he retained a possessory interest in the property. The District Court rejected the motions of both parties for directed verdict, and at the conclusion of the case rendered judgment for the deceased husband's estate. The Government appealed, contending that it was entitled to a directed verdict and that an agreement that the husband was to enjoy a possessory interest in the property must be implied from the circumstances and conduct of the parties.

The Third Circuit rejected this contention of the Government and affirmed the judgment of the trial court, thereby holding that there was evidence from which the District Court, as trier of fact, could properly find that no such agreement existed.

It is clear that the principles stated in these cases are not limited to instances in which the grantor and grantee are husband and wife, but apply to other intrafamily transfers. For example, in *Silverman v. McGinnes*, 259 F.2d 731 (3rd Cir., 1958), the deceased, Edwin Silverman, gave some bonds, which had been the property of himself and his former wife, to his present wife and also gave to his children his interest in some bonds in which he and his children had previously been joint owners. The confirmation of this gift was stated in a letter. The Circuit Court held that even though the bonds were not reissued in the names of the respective donees as required by Treasury regu-

lations, this did not preclude the finding that the deceased had made a valid gift of such bonds to his wife and to his children during his lifetime and that the value thereof was not includable in the decedent's gross estate for tax purposes.

In *Chandler v. United States*, 312 F.S. 1263 (ND Cal., 1970), affirmed, 460 F.2d 1281 (9th Cir., 1972), the Court held that the deceased, Mary Baum, made a valid gift of United States Series E bonds to her granddaughters, even though the deceased did not have the bonds reissued solely in the names of the donee granddaughters, and at the time of the deceased's death the bonds were still in the name of the decedent, Mary E. Baum, or Patricia Ritter, or Beatrice Baum, her granddaughters.

In *Estate of Roy D. Barlow*, 55 T.C. 666 (1971), the deceased executed a deed of a 372-acre farm to his four children and subsequent thereto leased the property back from his children. The conveyance was executed in 1957. The Government contended that the property was includable in the estate of the deceased Barlow, and in support of this contention argued the evidence showing that Barlow did not pay any rent on the property to his children for the years 1959 through 1963. Barlow died in 1963. The Court held that there was a valid conveyance of the property by the deceased during his lifetime and the property was not includable in his gross estate. The Court noted the evidence of the financial difficulties of the deceased which arose subsequent to the conveyance of the property, which would support the conclusion that the fact that the

deceased did not pay rent was not contemplated or agreed upon at the time of the conveyance and lease-back. The Court said (p. 670-671):

> "Under the terms of the deed and lease, decedent did not qualify the transfer in the proscribed manner. The deed was executed by petitioner and decedent, delivered to the children, and properly recorded; it conveyed fee simple title to them as of February 15, 1957, and decedent's death added nothing to their rights. By reason of the deed, they acquired the right to the economic benefits flowing from the ownership and use of the land — the right to a fair rental for its use."

CONCLUSION

It is well settled throughout the United States that a co-tenant or co-owner of property has the right to use and possession of all of the property and may collect and receive the entire income from the property, holding the proportionate part thereof belonging to his co-tenant in trust for his co-tenant. Therefore, in a co-tenancy situation under *Title 26, U.S.C., § 2036(a)*, the fact that a person conveying undivided interest in property to another continues to enjoy possession of the entire tract and collect the income therefrom should not be held to "conclusively establish" that there was an express or implied agreement between the grantor and grantee giving the grantor the "right" to use and enjoyment of all of the property and the income therefrom during the grantor's lifetime.

In the case at bar, the District Court could not properly direct a verdict in favor of the Government if there was any evidence of probative weight that at the time of the conveyance there was no agreement between the grantor and grantee retaining lifetime use of all the income in the property conveyed in the grantor. It is undisputed that there was no express agreement, and we respectfully submit there is not only some evidence, but abundant evidence, both direct and circumstantial, that no implied agreement existed, and the District Court, therefore, erred in directing a verdict in favor of the Government, and the issue of the existence, vel non, of an implied agreement should have been submitted to the jury for its determination.

WHEREFORE, Petitioner respectfully prays that this Court grant this Petition for Certiorari and that upon full hearing of this cause this Court enter judgment reversing the Judgment of the District Court and the Fifth Circuit.

Respectfully submitted,

ANDERSON, EDWARDS & WARNICK
1010 Lubbock National Bank Bldg.
Lubbock, Texas 79401

By_____
Hugh Anderson
Attorneys for Petitioner

CERTIFICATE OF SERVICE

Three copies of the above and foregoing Petition for Writ of Certiorari have been mailed to Mr. Scott P. Crampton, Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C., 20530, on this 23 day of March, 1973.

Hugh Anderson
Of Counsel

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3232
Summary Calendar*

JUANELLE TUBBS,
Plaintiff-Appellant,
versus
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas

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(January 15, 1973)

Before
THORNBERRY, COLEMAN and INGRAHAM,
Circuit Judges.

PER CURIAM: The facts in this estate tax refund suit are well summarized in the district court's opinion, which we attach hereto as an appendix. Those facts establish conclusively the existence of an implied agreement that the transferor was to have lifetime enjoyment of the property. *Guynn v. United States*, 4th Cir. 1971, 437 F.2d 1148. Thus, the value of the property was properly includible in the transferor's

*Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5th Cir. 1970, 431 F.2d 409, Part I.

estate, and the district court properly directed a verdict in appellee's favor. AFFIRMED.

APPENDIX

MEMORANDUM OPINION AND JUDGMENT

(Number and Title Omitted) (Filed Aug 4, 1972)

In November of 1961 Mrs. Linnie R. Garrard conferred with Mr. James Milam, an attorney of Lubbock, Texas, and inquired of him as to the amount of property she could convey to her daughter, Mrs. Juanelle Tubbs, the plaintiff in this case, without being required to pay a gift tax. Mr. Milam told her of the $30,000.00 lifetime exemption and after further conversation advised her that she could convey an undivided 480-acre interest in a 1,293 acre tract of land which she owned in Lynn County, Texas, and which would not be of sufficient value to require the payment of any gift tax. He also advised Mrs. Garrard that there must be "no strings attached" to the gift and that the income from this part of the land would belong to Mrs. Tubbs. Mrs. Garrard replied that this was what she wanted and indicated that she would follow this advice.

The following month, on December 26, 1961, a deed of conveyance of the 480-acre undivided interest out of the larger tract was executed and acknowledged by Mrs. Garrard to her daughter, Juanelle Tubbs, reciting a $10.00 consideration, and the deed was subsequently recorded in the Deed Records of Lynn County, Texas. Mrs. Garrard died on March 4, 1966, and left a will appointing Mrs. Tubbs as her independent executrix and devising her entire estate to Mrs. Tubbs.

From the date on which the deed was executed in December of 1961 until the date of Mrs. Garrard's death, the entire income from oil and gas rentals, crop rentals and other income from the land in question was received by Mrs. Garrard. Mrs. Garrard reported this income, from the entire tract of land, including the interest conveyed to Mrs. Tubbs, on her various income tax reports for the years in question; Mrs. Tubbs did not at any time account for any portion of the income from the land during these years on her own personal income tax returns. Further, Mrs. Garrard paid the state and local taxes on the land and on her income tax returns claimed depreciation for the improvements thereon, and of course paid the income tax due and owing for the respective years.

Mrs. Tubbs testified that she did not in any way keep an account of the income from the land after she received the deed from her mother and did not know what the income was from the date of the gift to the date of her mother's death. She never discussed the amount of the rents from the land and had no agreement or discussion about Mrs. Garrard's retaining possession and enjoyment of the land or the income therefrom. Her mother, Mrs. Garrard, never paid any of the rents or other income to her and she never received same; she never paid any of the expenses of the operation of the land; and she did not demand at any time that her mother pay her a proportionate part of the income. The plaintiff, Mrs. Tubbs, did state that she felt that she had a right to and could demand a portion of the income but that because her mother lived frugally and was saving the money and because

she did not need it, she never asked her mother for any portion of that income.

Shortly after the gift, a proper gift tax return was filed as shown by the exhibit in the record.

The attorney, Mr. Milam, testified that after his original conversation with Mrs. Garrard about the gift and after the deed was executed he does not remember having any further conversations with Mrs. Garrard or other members of the family about the farm or the income therefrom.

The accountant for Mr. and Mrs. Tubbs testified that none of the income from the farm was reported on their personal income tax for the years 1962 through March 4, 1966.

An estate tax return was filed on Mrs. Garrard's estate, and the 480-acre interest conveyed to Mrs. Tubbs in 1961 was not listed nor valued for estate tax purposes. Subsequently an audit and investigation of the estate revealed the gift in 1961 and substantially all of the above facts, whereupon the Internal Revenue Service made an additional assessment against the estate of Mrs. Garrard and included in her estate the value of the 480-acre interest which she had conveyed in 1961 to her daughter. It is the position of the government that under Section 2036(a)(1) of the Internal Revenue Code of 1954, 26 U.S.C. §2036(a)(1), the gross estate shall include the value of the property conveyed to Mrs. Tubbs because Mrs. Garrard retained for her life the possession or enjoyment of, or the right to, the income from the interest in the property conveyed to her daughter.

The burden is upon the plaintiff in this case to prove that Mrs. Garrard did not retain the right of possession or enjoyment or the right to the income from the property. *Kokes v. United States*, 68-1 USTC, ¶ 12,530 (D.C. Neb. 1968). *First Trust & Deposit Co. v. Shaughnessy* 134 F.2d 940 (2d Cir .1943), *cert. denied*, 320 U.S. 744 (1943). The Court is of the opinion that the plaintiff has not met this burden of proof.

After all evidence had been presented and both sides had rested, the defendant presented a motion for a directed verdict, which the Court announced in open court that it would grant.

Not only did the plaintiff fail to carry the burden of proof required in this case, but the evidence plainly shows that Mrs. Garrard did in fact retain the possession and enjoyment of the interest in the property that she conveyed. It is uncontroverted from the facts that all of the income from this land was paid to Mrs. Garrard and that she had it in her possession and paid all of the expenses of the land including the taxes, took the depreciation, and exercised all rights of enjoyment of said land. As a matter of fact, only bare legal title was conveyed by Mrs. Garrard to her daughter in 1961, and on and subsequent to that date and up until the date of her death all other attributes and privileges of ownership were possessed and enjoyed by Mrs. Garrard.

The evidentiary facts in this case are not in dispute and a great amount of the evidence was by stipulation and agreement. Viewing this uncontroverted evidence in the light that is most favorable to the plaintiff and

plaintiff's cause of action, it appears to the Court that the plaintiff has not only failed to carry its burden to make out a prima facie case in her behalf, but that reasonable men and women could not differ as to the ultimate conclusion to be drawn in arriving at a verdict in this case. From this evidence the defendant is entitled to a judgment as a matter of law, and a directed verdict in favor of the defendant government is therefore in order.

There is no evidence in this case that the plaintiff had anything more than bare legal title which standing alone is not sufficient to overcome the requirements of Section 2036(a)(1) that this interest in land be includible in the gross estate of Mrs. Garrard. The ten dollar consideration recited in the deed of conveyance is of course insufficient when considered with the other evidence to meet the requirement of Section 2036(a) of "adequate and full consideration."

Section 2036(a)(1) would be emasculated if not applied in favor of the government in the present case, for the very purpose of the section is to prevent a mere formal transfer from removing property from a donor's estate, for purposes of escaping estate taxation, where the donor retains possession and enjoyment of, and the income from, "donated" property. The evidence in this case shows that the donee did not in any way possess or enjoy the interest in the property until after her mother's death. To say that she could have received such rights of possession and enjoyment had she asked for them (and the evidence shows that had she so requested her mother would have agreed)

does not change the facts as they existed, *(McNichol's Estate v. C.I.R.*, 265 F.2d 667 (3d Cir. 1969)), *cert. denied*, 361 U.S. 829 ((1959)); *Guynn v. United States*, 437 F.2d 1148, 1150 ((4th Cir. 1971)) and these facts are all contrary to the taxpayer's position in this case.

It is therfore ORDERED, ADJUDGED AND DECREED that the plaintiff, Juanelle Tubbs, take nothing and have and recover nothing of and from the defendant, The United States of America, and all costs are taxed against the plaintiff.

The Clerk will furnish a copy of this memorandum opinion and judgment to each attorney.

ENTERED this 4th day of August, 1972.

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
United States District Judge

APPENDIX 2

RECEIVED Mar 2 1973

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-3232
Summary Calendar

D. C. Docket No. CA-5-905

JUANELLE TUBBS,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

Before
THORNBERRY, COLEMAN and INGRAHAM,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under

submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

January 15, 1973

Issued as Mandate:

APPENDIX 3

S. Court of Appeals
FILED
FEB 16 1973
Edward W. Wadsworth, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3232
Summary Calendar*

JUANELLE TUBBS,
Plaintiff-Appellant,
versus
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas

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(FEBRUARY 10, 1973)

ON PETITION FOR REHEARING

Before
THORNBERRY, COLEMAN and INGRAHAM,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

APPENDIX 4

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

Edward W. Wadsworth
Clerk

600 Camp St. - Rm. 102
New Orleans, La. 70130

February 28, 1973

Mr. Hugh Anderson
Attorney at Law
1010 Lubbock National Bank Bldg.
Lubbock, Texas 79401

No. 72-3232 — Juanelle Tubbs vs. U.S.A.

MANDATE STAYED TO: 3/30/73 ONLY

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari,

and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
By /s/ Maryette K. Farley
Deputy Clerk

enc.

cc. Mr. John Russell Crews
Mr. Frank D. McCown
Mr. William W. Guild
Hon. Scott P. Crampton
Mr. Eldon B. Mahon